CG Docket Nos. 02-278 & 05-338

FEDERAL COMMUNICATIONS COMMISSION

IN THE MATTER OF BEST DOCTOR'S, INC.'S PETITION FOR DECLARATORY RULING

Rules and Regulations Implementing the Telecommunications Consumer Protection Act of 1991;
Junk Fax Prevention Act of 2005

COMMENTS OF ENCLARITY, INC.

TIFFANY CHEUNG
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA
Telephone: (415) 268-7000

JOSEPH R. PALMORE
BRYAN J. LEITCH
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue N.W.
Washington, D.C. 20006
Telephone: (202) 887-6940
JPalmore@mofo.com

Counsel for Enclarity, Inc.

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Enclarity, Inc., respectfully submits these comments in response to the Commission's Notice Requesting Comments in CG Dkt. Nos. 02-278 & 05-338.[1]

INTRODUCTION AND SUMMARY

Enclarity is a defendant in a Telephone Consumer Protection Act case that vividly illustrates the imperative need for the Commission to issue the requested declaratory ruling and clarify the meaning of "advertisement" under that statute.

The healthcare industry loses billions of dollars every year due to inaccurate and outdated healthcare provider information. Enclarity helps to mitigate that problem by providing healthcare organizations an extensive database of verified medical provider information. Among other things, Enclarity's database allows healthcare organizations to more efficiently reimburse providers for medical bills; renew prescriptions; convey product recalls; and reduce fraud, waste, and abuse. Enclarity's database also helps to preserve patient privacy and improve healthcare outcomes through identity management, predictive modeling, and claims analytics.

Although Enclarity's database is made up of information that is in the public domain, Enclarity verifies that information to ensure its accuracy. To that end, Enclarity sends faxes to medical providers simply asking them to verify or update their contact information. Appx1. In requesting information from recipients,

[1] Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling by Best Doctors, Inc., CG Docket Nos. 02-278 & 05-338, DA 18-1296 (rel. Dec. 21, 2018).

Enclarity's faxes offer no product or service to anyone. *Id.* They contain no pricing, ordering, or sales information, and they do not ask recipients, directly or indirectly, to engage in any commercial activity. *Id.*

Yet a fax of this nature is now the subject of a putative TCPA class action against Enclarity seeking classwide statutory treble damages of $1,500 per fax. *Matthew N. Fulton, D.D.S. v. Enclarity, Inc.*, No. 16-13777, 2017 U.S. Dist. LEXIS 28439, at *1-3 (E.D. Mich. Mar. 1, 2017). The suit alleges that, even if Enclarity's fax was not on its face an "advertisement" under the TCPA, it could be a "pretext" to advertise based on extraneous information that Enclarity never sent to a fax machine. *Id.* That theory directly contravenes the text and structure of the TCPA, and yet the Sixth Circuit ordered that the case proceed to discovery nonetheless. *Matthew N. Fulton, D.D.S. v. Enclarity, Inc.*, 907 F.3d 948 (2018).

The Commission should reject the theory adopted in Enclarity's case and interpret the statute according to its plain terms. A fax is not an "advertisement" under the TCPA unless it promotes a good or service on its face by initiating a commercial transaction with the recipient. 47 U.S.C. § 227(a)(5). Otherwise, the fax is not inherently commercial in nature, and thus cannot be an advertisement. *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 224 (6th Cir. 2015). The Commission seemingly endorsed this reading of the statute when it stated in its 2006 Order that "informational" faxes "would not be prohibited by

the TCPA rules." *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006) (2006 Order).

But as Enclarity's case shows, courts are divided over the meaning of these terms and the Commission's 2006 Order. Many courts have correctly held that faxes are not TCPA ads if, on their face, they merely request or provide information. *E.g.*, *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362 (11th Cir. 2017). Yet others have surmised that they must look beyond the fax's four corners and delve into fact issues about the sender's business that will often preclude dismissal on the pleadings. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 467-68 (4th Cir. 2018), *cert. granted in part*, No. 17-1705, 2018 U.S. LEXIS 6754 (U.S. Nov. 13, 2018).

The Commission should resolve this conflict now under its authority to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); *see* 47 C.F.R. § 1.2(a). As Best Doctors' petition shows (Pet. 11-17), the plain text of the TCPA supports a ruling that the TCPA covers only faxes that are advertisements *on their face*, without regard to extraneous material not sent to any fax machines. Courts need the Commission to clarify that a fax is not an ad simply because its content relates to the sender's business. Rather, the Commission should explain that, consistent with its 2006 Order and the

statute's text, a fax is an ad if and only if its content promotes a good or service by proposing or initiating a commercial transaction with the recipient.

ARGUMENT

THE COMMISSION SHOULD CLARIFY THAT THE FOUR CORNERS OF THE FAX CONTROL UNDER THE TCPA

A. The Plain Language Of The TCPA Limits The "Advertisement" Analysis To The Face Of The Fax

The TCPA bars "unsolicited advertisements" sent "to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The statute defines "advertisement" to include only those faxes "advertising the commercial availability or quality of any property, goods, or services." *Id.* § 227(a)(5).

That language plainly focuses on the face of the fax. To "advertise" a good or service, one must "draw attention to [it] in a public medium in order to promote sales." Oxford Dictionary of English 24 (3d ed. 2010). Similarly, a communication is "commercial" when made to obtain a "profit" from the recipient. Webster's Third New Int'l Dictionary 456 (1986). And to "send" an advertisement to a fax machine, one must "dispatch" it, or cause it "to be conveyed," to that machine. American Heritage Dictionary 1642 (3d ed. 1992).

The TCPA thus does not prohibit every fax that merely "'makes known' the quality or availability of a good or service." *Sandusky*, 788 F.3d at 223-24. Nor does it bar every fax related to the sender's business. *Id.* Rather, the statute covers

only those faxes that on their face try "to induce the [recipient] to purchase [the sender's] products." *Florence*, 858 F.3d at 1366-67. This is confirmed by the statute's singular focus on ads sent "to a telephone facsimile machine" and its silence about other forms of advertising. As Best Doctors' petition also argues, anything *not* sent to the recipient's fax machine—which necessarily includes everything beyond the face of the fax—is thus irrelevant and cannot justify TCPA liability. *See* Petition 15 ("If no advertisement is sent to a facsimile machine, then the TCPA is not relevant.").

It follows that a fax merely soliciting information, without proposing a commercial transaction with the recipient, is not a TCPA "advertisement." After all, simply requesting information via fax does not draw attention to a commercial good or service, must less induce recipients to buy the sender's goods or services. That is particularly true with Enclarity's faxes, which sought only updated or verified contact information from healthcare providers. Those providers are not Enclarity's customers or even its target market—its customers are principally insurance companies, pharmacy benefit managers, and life-sciences companies. The Commission should clarify that, because faxes like Enclarity's are not "drawing the *relevant market's* attention to its product to promote its sale," they are not advertisements under the TCPA. *Sandusky*, 788 F.3d at 222 (emphasis added).

B. Courts Are Deeply Divided Over The Meaning Of "Advertisement" And The Proper Scope Of Analysis

Although courts generally follow this sensible reading of the statute, a few have held that they *must* look beyond the four corners of a fax to determine if it is an advertisement. *See supra* pp. 1-3; Petition 11-17. But rather than ground that approach in the text of the TCPA, these courts rely instead on an isolated passage from the Commission's 2006 Order discussing faxes that are a "pretext" for advertising. *E.g.*, *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 95-97 (2d Cir. 2017). That reliance is misplaced.

The Commission's 2006 Order posited that the TCPA may cover faxes promoting "free goods and services" if they "serve as a pretext to advertise." 71 Fed. Reg. 25,967, 25,973. The Commission had in mind faxes promoting free seminars, which are often used to sell commercial goods and services to recipients indirectly. *Id.* The Commission made clear, however, that no pretext analysis applies to "informational" faxes—that is, faxes providing or requesting information or those in which "an advertisement is incidental to an informational communication." *Id.* The Commission explained that a fax's status as "informational" turns principally on the face of the fax, including "the text of the communication" and "the amount of space devoted to advertising versus the amount of space used for information or 'transactional' messages." *Id.*

In Enclarity's case, the Sixth Circuit misread the Commission's narrow statement on faxes offering free goods and services to require a searching examination of Enclarity's business model and materials Enclarity never sent to any fax machine. *Fulton*, 907 F.3d at 952-55. The court acknowledged that Enclarity's fax merely "solicits information to verify its system of provider information." *Id.* at 955. Yet the court held that the fax could have "served as a commercial pretext for future advertising" from "other health care organizations" based on website printouts not attached to Enclarity's fax. *Id.* According to the Sixth Circuit, looking beyond "the face of the challenged fax" is effectively *mandatory*: "A court could not possibly resolve a claim that a fax was pretextual if it confined its evaluation to the fax itself." *Id.* at 952-53.

The Fourth Circuit adopted a similarly flawed approach. In *PDR*, the court held that the TCPA barred faxes inviting recipients to "Reserve Your Free 2014 *Physicians' Desk Reference* eBook" on the theory that the Commission's 2006 Order established a mandatory "prophylactic presumption" that required "no commercial nexus at all" between the fax and the sender's business. 883 F.3d at 462, 466-68. The court acknowledged that its "rule may be overinclusive," but it held that "requiring a fax to propose a specific commercial transaction on its face takes too narrow a view." *Id.* at 467-68. The Fourth Circuit concluded instead that the Commission's 2006 Order required an evidentiary inquiry into matters entirely

divorced from the four corners of the fax, including the "details of PDR Network's business model" and whether "PDR Network receives money from pharmaceutical companies whose drugs are listed in the *Physicians' Desk Reference*." *Id.* at 468.

Other courts disagree. The Eleventh Circuit, for example, holds that faxes are not TCPA advertisements when they merely "request information" on their face. *Florence*, 858 F.3d at 1366-67. In *Florence*, a medical supplier (Arriva) sent faxes to a clinic (Florence) about products that Florence's patients purchased from Arriva. *Id.* at 1364-65. The court held that the faxes did not violate the TCPA because they did not, on their face, "induce the clinic to purchase Arriva products" or "induce the physicians to prescribe those products to patients," but instead merely sought "information from physicians" and asked "only that the doctor of the patient fill out an order form to facilitate a purchase made by that patient." *Id.* at 1366-67.

The Sixth Circuit likewise held (in a case decided before Enclarity's) that courts must focus on "the *content* of the message" rather than "extraneous and speculative down-the-stream evidence." *Sandusky*, 788 F.3d at 224-26 (emphasis added). In *Sandusky*, a pharmacy benefit manager (Medco) sent a healthcare provider (Sandusky) faxes about Medco's "formulary," a proprietary list of medications. *Id.* at 220-21. The faxes asked Sandusky to "please consider prescribing plan-preferred drugs," and they invited it to "view the formularies

online" at Medco's website. *Id.* at 226-28. The Sixth Circuit held those faxes were not TCPA ads regardless of their "hypothetical future economic benefit" to the sender. *Id.* at 225. The court explained that information "ancillary to the *content* of the fax" was "*legally irrelevant* to determining whether the fax is an ad." *Id.* at 225-26 (emphases added). Focusing instead on "what the faxes look like on their face," the court held that the faxes there were not advertisements because they were not "soliciting business from Sandusky" or otherwise trying to "sell things to the recipient." *Id.* at 222-26.[2]

Sandusky emphasized that the Commission's 2006 Order "would only bolster [its] conclusion." *Id.* at 223. The court recognized that "a fax need not be an explicit sale offer to be an ad." *Id.* at 225. But it also recognized that the Commission had not licensed a free-roaming inquiry beyond the face of the fax simply because a fax is allegedly a pretext to advertise. *Id.* at 225-26. Contrary to the Fourth Circuit's view, the *Sandusky* decision refused to permit a searching examination into the sender's "advertising practices" or its "pecuniary interest" in the faxes. *Id.* The court held instead that "the fax *itself* must at least be an indirect commercial solicitation, or pretext for a commercial solicitation"—meaning that a

[2] *See also, e.g.*, *Supply Pro Sorbents v. RingCentral, Inc.*, 743 F. App'x 124, 124-25 (9th Cir. 2018) (evaluating only the face of the fax in holding that "a one-line statement, 'Send and receive faxes with RingCentral, www.ringcentral.com RingCentral®'" did "'not convert the entire communication into an advertisement'"); *Phillips Randolph Enters., LLC v. Adler-Weiner Res. Chi., Inc.*, 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007) (rejecting TCPA claim where fax "[o]n its face" promoted only "a research study").

fax's pretextual nature must be evident from its "four corners." *Id.* (emphasis added).

C. The Proliferation Of TCPA Litigation Underscores The Need For The Commission To Clarify That Faxes Requesting Information Are Not "Advertisements"

The need for Commission action here is particularly important given the proliferation of vexatious TCPA litigation in recent years. As Chairman Pai has observed, "the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014." *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8073 (2015) (Comm'r Pai, dissenting), *vacated in part*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The high volume of TCPA litigation persists, moreover, even though the injuries targeted by the statute (*i.e.*, the cost of fax paper and ink) have largely vanished from modern life. *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941

(7th Cir. 2016) ("Fax paper and ink were once expensive, and this may be why Congress enacted the TCPA, but they are not costly today.").[3]

This growth in TCPA litigation is even more troubling in light of the statute's "potential of ruinous financial liability." *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1048 (S.D. Cal. 2015). As courts have noted, the TCPA gives courts "discretion to increase damages that, at $500 per call, are already greater than actual damages in most cases." *Parchman v. SLM Corp.*, 896 F.3d 728, 740 (6th Cir. 2018). The prospect of obtaining such a windfall has led many companies to make "filing class action junk-fax suits" part of their "business model." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723-24 (7th Cir. 2011) (noting one "small civil engineering firm" had "filed at least 150 class action suits under the [TCPA]"). It is doubtful "Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses," "while plaintiffs' attorneys take a big cut." *Bridgeview*, 816 F.3d at 941 (noting the TCPA "has blossomed into a national cash

[3] *See* U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* 3 (Aug. 2017) (noting more than 1,000 TCPA class actions filed in a recent 17-month period); Adonis Hoffman, Commentary, *Sorry, Wrong Number, Now Pay Up*, WALL ST. J. (June 15, 2015) ("In the past two years, TCPA lawsuits have extracted large settlements from companies. . . . Plaintiffs' lawyers received an average of $2.4 million."); Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 84-85 (2011) (observing that most faxes are now received on computer fax servers that allow recipients to view before printing, which effectively eliminates unwanted paper and ink costs).

cow for plaintiff's attorneys"); *see First Mercury Ins. Co. v. Nationwide Sec. Servs.*, 54 N.E.3d 323, 336 (Ill. Ct. App. 2016) (cautioning that "the proliferation of TCPA class actions" has nothing to do with "compensating members of the class" and "everything to do with compensating the lawyers of the class").

Chairman Pai was thus correct that "in practice the TCPA has strayed far from its original purpose"—yet he was also correct that "the FCC has the power to fix that." *See* 30 FCC Rcd. at 8073 (Comm'r Pai, dissenting). The Commission should do just that in this proceeding by clarifying that a fax requesting information from recipients is not on its face an "advertisement" or "pretext" to advertise, and thus cannot give rise to TCPA liability. As Best Doctors' petition argues, "a faxed request to verify the contact information" of recipients "is not an 'advertisement' under the TCPA" because "only the fax itself should be examined" in making that determination. Petition 15-17.

A contrary rule could effectively immunize from Rule 12(b)(6) dismissal *every* TCPA fax-as-pretext claim, which would in turn require defendants to undergo the burdens and costs of discovery or settle even meritless suits to avoid such costs. Indeed, the Second, Fourth, and Sixth Circuits have made no effort to conceal that this is the consequence of their reading of the TCPA. *Fulton*, 907 F.3d at 952-53 ("Finding a fax to be pretext for a subsequent advertising opportunity would *require* looking to what came after the fax." (emphasis added)).

As the Second Circuit candidly acknowledged, its "commercial nexus" standard requires courts to "presume" that a defendant's faxes are advertisements at the pleading stage if they mention anything allegedly "relating to its business"—a presumption defendants "can rebut . . . *only after discovery*." *Boehringer*, 847 F.3d at 95-97 (emphasis added). And the Fourth Circuit went even further in "requiring no commercial nexus at all" at the pleading stage, which effectively precludes dismissal of TCPA claims before plaintiffs have "taken any discovery." *PDR*, 883 F.3d at 468. Those conclusions find no support in the text or purpose of the TCPA, *see supra* pp. 4-5, 11-12, and the fact that they will only embolden unnecessary and wasteful litigation provides even more reason to reject them.

CONCLUSION

The Commission should grant the petition and issue a declaratory ruling clarifying that the TCPA does not permit courts to look beyond the four corners of the fax in determining whether it is an advertisement, and that a mere request to confirm or update contact information is not a TCPA advertisement.

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Respectfully submitted,

s/ Joseph R. Palmore

TIFFANY CHEUNG
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA
Telephone: (415) 268-7000

JOSEPH R. PALMORE
BRYAN J. LEITCH
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue N.W.
Washington, D.C. 20006
Telephone: (202) 887-6940
JPalmore@mofo.com

Counsel for Enclarity, Inc.

APPENDIX

LexisNexis®

Provider: Dr. Matthew Norman Fulton, DDS
Address: 401 N Bridge St, Linden, MI 48451
Practice Phone: (810) 735-7815
Secure Fax: (810) 735-1905

Re: Fax Number Verification for Delivery of Patient PHI (Internal ID:34290748)

The purpose of this Fax Verification Request is to help preserve the privacy and security of your patients' Protected Health Information ("PHI"), as defined by the Health Insurance Portability and Accountability Act ("HIPAA"). LexisNexis is seeking your cooperation to verify or update your information. We validate and update the fax in our system so our clients can use them for clinical summaries, prescription renewals, and other sensitive communications. Verifying the practice address, phone number and your secure fax number (s) for this location will minimize the potential privacy risks that could arise from information sent to an unsecured location. As part of our effort to assure that the transmission of PHI, it is vital to verify the information for Dr. Matthew Norman Fulton, DDS is accurate. This information will be verified once each year.

☐ YES - ALL of the printed information shown above is CORRECT and secure for communications containing PHI.

☐ NO - Updated info Below / Not at this location / Deceased (please circle).

Complete if changed:
Practice Address:
Practice Phone:
Provider Email:
Secure Fax:

SIGN & FAX BACK TO (866) 699-0422

I confirm that the above information is true and correct and safe for communication containing PHI to the best of my knowledge.

Name:
Title(if other than Provider):
Email(if other than Provider):

Signature:

Date:

Comments: